

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 439 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
  2. To be referred to the Reporter or not? : NO
  3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
  5. Whether it is to be circulated to the Civil Judge? : NO

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DARABSHAW B. CURSETJEE'S SONS (GUJ) PVT LTD

Versus

GUJARAT MARITIME BOARD  
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Appearance:

MR RJ OZA for Petitioner

MR UNMESH D SHUKLA for Respondent No. 1  
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CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 30/06/2000

ORAL JUDGEMENT

This Revision Application has been filed under section 115 of the Code of Civil Procedure, 1908 against the judgment and order dated 5.5.93 recorded by the

learned third Joint Civil Judge (SD), Bhavnagar in Special Civil Suit No.216/91 under which the learned trial Judge dismissed the said application Exh.7. Brief facts of the case are as under:

2. The parties to the aforesaid Special Suit No.216/91 had referred certain issues to the Arbitrator voluntarily and thereafter, it appears that there was an application before the Court for referring some issues to the Arbitrator. The Court agreed to the same and additional issues were also referred to the Arbitrator. Thereafter, the Arbitrator had submitted his award and the award has become the rule of the Court and there is no dispute about the said position. Thereafter, the present petitioner submitted application before the trial court stating that following two reliefs may be granted to the petitioners:

(a) Either remit the issue of pendente lite interest for decision of the same to the Arbitrator to be decided within the given time and/or,

(b) The Court be pleased to award a decree by including a interest pendente lite.

3. After hearing the parties, the Court below found that the petitioners were not entitled to the aforesaid relief and, therefore, application Exh.7 was dismissed. Feeling aggrieved by the said order, the petitioners have preferred this Revision Application before this Court. It has been mainly contended here that the Court had power and jurisdiction to entertain the aforesaid application and grant aforesaid reliefs and yet the trial court has failed in exercising its jurisdiction and therefore, there is jurisdictional error on the part of the trial court. It is, therefore, prayed that the present Revision Application be allowed and orders as prayed for, be passed in favour of the petitioners.

4. I have heard Mr R J Oza, learned Advocate for the petitioner and Mr Y F Mehta, learned Advocate for the respondent and have perused the papers. The petitioners have supplied copies of the materials referred by the trial court also.

5. From the arguments of the parties, it appears that on 20.4.1979, an agreement was entered into between the parties. On 4.9.1986, an Arbitrator was appointed. On 29.12.1996, statement of the claim was filed and on 30.11.1991, the award was filed in the Civil Suit. On

the aforesaid set of facts, it has been strenuously argued on behalf of the petitioners that till the date of filing of the award in the Civil Court in November, 1991, the position of law was that the Arbitrator in this country were not entitled or authorised to pass award with respect to interest during the pendency of the matter before them. Therefore, according to the argument of the learned Advocate for the petitioners, Arbitrators were not entitled to award interest pendente lite and, therefore, the said relief was not referred to the Arbitrator. In this connection, learned Advocate for the petitioners has relied upon a decision in the case of Secretary, Irrigation Department, Government of India v. G C Roy, AIR 1992 SC 732. It seems that by this decision, the Hon'ble Apex Court held that when the agreement is silent as to grant of interest, it has to be presumed as implied term of agreement and the Arbitrator has power to award pendente lite interest. While deciding the aforesaid principle, the Apex Court has bypassed the previous decision of the Apex Court itself. There is no dispute that under the aforesaid decision, the new principle was brought in light showing that the Arbitrators are entitled to award interest pendente lite, but at the same time, prior to the said decision, the previous decision of the Supreme Court was there and there it had been laid down that the Arbitrators were not courts and they could not award interest pendente lite. There is also no serious dispute about the said position of law. It is an undisputed fact that the award was filed in the Civil Court on 30.11.1991. It is an admitted fact that as per the decision of the Apex Court which stood on that date, the Arbitrators were not authorized or entitled to grant interest pendente lite. Thus it is also an admitted fact that on 17.12.1991, the Supreme Court decided in the aforesaid decision of AIR 1992 SC 732 that Arbitrators can award interest pendente lite. It is, therefore, an admitted position that the law has been changed subsequent to the filing of the award. These facts are not very much in dispute even during the course of arguments advanced on behalf of the parties by their respective Advocates.

6. Thereafter, the learned Advocate for the petitioner has drawn attention of the Court to an application being Civil Misc.Application No.148/88. In para 11 (b) of the said application, the parties have stated as follows:

"11.(b) On the Arbitrator awarding and deciding  
the quantum of amount payable to the applicant

under the Escalation Clause, whether the applicant is entitled to claim interest on the amount so awarded at the rate of 18% per annum in lieu of compensation or otherwise from 20.4.79 the date of contract and during the pendency of the arbitration proceedings and after the Award and till payment to the applicants."

Therefore, it is very clear that the issue was that the applicant was entitled to claim interest on the amount so awarded at the rate of 18% in lieu of the compensation or otherwise from 20.4.19979 i.e. the date of contract and during the pendency of the arbitration proceedings and after the award till payment to the applicant. However, clause (15) is the final relief clause wherein the prayer was as follows:

"15. The applicant therefore prays as under:

A) The Hon'ble Court may be pleased to hold  
and declare that the scope of the  
Arbitration proceedings No.CE/ARB/61  
requires to be enlarged by including the  
matters in controversy as set out in para  
11 hereinabove."

There is a reference to affidavit of Sheroe Merwan Khodabux filed in the aforesaid Civil Misc.Application No.148/88. Para 14 of the said affidavit shows that the Company had claimed interest at the rate of 18% from the GMB on the amount of escalation claimed from the date of contract till the award of the learned Arbitrator and till the date of payment by the GMB to the applicant on such sums awarded. Therefore, there is a reference with respect to the interest as a whole including the interest pendente lite. However, when the matter was finally referred to the Arbitrator, it is very clear that the issue with respect to the interest pendente lite, was not referred for decision of the Arbitrator.

7. Learned Advocate for the petitioner has argued that the aforesaid statement was referred to the Arbitrator because in view of the aforesaid decision of the Apex Court, the Arbitrators were not entitled or authorized to award interest pendente lite. That since the Arbitrators were not entitled to award interest pendente lite, the said issue was not referred to the Arbitrator. Even if the said issue was not referred to the Arbitrator on the aforesaid consideration, the fact remains that the parties had not referred the said issue

to the Arbitrator. In that case, it has to be considered whether the trial court could have directed the Arbitrator to de novo decide the said issue.

8. In my view, when the Arbitrator had a Reference before him and when the Reference in writing showed the terms and conditions for the appointment of the Arbitrator and when the terms and conditions of Reference specifically included the question of interest before the appointment of Arbitrator and subsequent to the award and when there was no mention about the interest pendente lite, then in that event, in my view that was not an issue before the Arbitrator and therefore, the Arbitrator could not have decided the said issue for which there is no dispute. However, the Arbitrator had a particular issue before him, he was required to decide the same. In the present case, the Arbitrator did not take the issue of consideration of grant of interest pendente lite and, therefore, he has not decided the issue. When the Arbitrator remained within four corners of the terms of Reference then in that event, the learned Judge could not have directed the Arbitrator to decide the question of interest pendente lite.

9. It may be considered here that this was not an application submitted for enlargement of the scope of the arbitration. The applicant directly claimed relief that the Arbitrator be directed to decide the issue of interest pendente lite. Since this was not a subject matter of the terms of reference wherein the Arbitrator did not and could not decide it and when it was not done by the Arbitrator, the Court could not remand the matter back. Since there was no error committed by the Arbitrator in deciding the issue before him, same way, when the matter was not a part of the terms of reference to the Arbitrator, the learned trial Judge himself could not decide the issue of grant of interest pendente lite. It is very clear that so far as the terms of reference are concerned, they did not include the interest pendente lite and, therefore, the Arbitrator was right in not deciding the said issue. In view of the said decision, the learned Judge cannot be said to have committed jurisdictional error in dismissing the said prayer made by the petitioners in his behalf.

10. Several judgments have been referred on behalf of the petitioner in support of their contentions. In AIR 1987 SC 2197 in the case of Vinodkumar vs. Smt. Surjit Kaur, the scope of jurisdiction of the Court in Revision has been discussed. There it has been observed that the High Court is fully justified in rejecting the finding of

the Rent Controller and the Appellate Authority, even though it is a finding of fact, when both the Authorities have based their findings on conjectures and surmises and they have lost sight of relevant pieces of evidence which have not been controverted.

10.1. In AIR 1968 SC 933, in the case of Associated Hotels of India Ltd. v. Ranjit Singh, there is a discussion with respect to the "waiver". It has been observed that a waiver is an intentional relinquishment of a known right. There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights.

It has been argued at this juncture that as per the case law of the Hon'ble Apex Court at the relevant point of time, it was not permissible for the Arbitrator to award interest pendente lite and, therefore, interest was not claimed and, therefore, it cannot be said that there was waiver. At the same time, it has to be considered that it was the case law and not a law though to some extent, a case law becomes law of the land so long as it is not quashed and set aside. In fact if the present petitioners felt that the petitioner was entitled to interest pendente lite, appropriate action could have been taken by the said petitioner to look into the said plea so that though as per the case law of the Hon'ble Apex Court, interest pendente lite could not be awarded, the petitioner would still be interested in the award of the same and the matter could have been carried right upto the Apex Court for a different decision on the subject. Instead of so doing the petitioner did not continue the said relief of interest pendente lite. Any way, the said relief was let gone or foregone because of the said case law at the relevant point of time. Therefore, the learned Judge was right in holding that when the said relief had been let gone or foregone, it could not be re-agitated in the aforesaid matter. Even if we take it that it was not a waiver in a very strict sense, the fact remains that the relief was let gone or foregone voluntarily. Therefore, the said decision cannot come to the rescue of the petitioner.

10.2. In AIR 1998 SC 367 in the case of Ram Nath International Construction Pvt. Ltd. v. State of U.P., it has been laid down that the Arbitrator is not prohibited from granting interest in terms of agreement. It has also been observed that power can be exercised analogous to Section 34 of the Code of Civil Procedure, that grant of interest is a question of discretion of

arbitrator and can be granted to do complete justice between parties. Hon'ble Apex Court held that the contractor was entitled to get interest from the date of reference to the date of award but not to any interest for reference period.

11. Firstly the observation of the Apex Court is that the arbitrator is not prohibited from granting interest in terms of agreement. Therefore, when terms of reference or agreement provided for a particular condition, the arbitrator can certainly go according to the said condition in the said agreement or reference and there cannot be any dispute about the same. It would be important to note that as referred in para 10 of the said judgment, clause 51 of the contract which deals with arbitration provides that all the disputes or difference in respect of which the decision has not been final shall be referred for arbitration to a sole arbitrator as specified therein. It has been further observed that on appreciation and interpretation of clause 51, neither clause 1.18 of the Technical Specification nor clause 51 excludes jurisdiction of the arbitrator to award interest pendente lite. Thereafter the Apex Court considered the case of Secretary, Irrigation Department, Government of Orissa v. G C Roy, (1992) 1 SCC 508 wherein it was held that when the terms of arbitration agreement did not exclude the jurisdiction of the arbitrator to entertain a claim for interest the arbitrator was competent to award interest pendente lite.

12. Here the question is different. The reference was made to the arbitrator and even the relief for interest pendente lite was dropped and it was not referred by excluding the said terms from the reference made to the arbitrator. Therefore, the case before this court will slightly differ from the fact of the case referred in AIR 1998 SC 367 and 1992 (1) SCC 508 (supra). Even if the said relief was dropped from the reference, the fact remains that the relief has been dropped and, therefore, it would not be open to the petitioner to re-agitate the said plea on the strength of the said decision of (1992) 1 SCC 508 (supra).

12.1. In JT 1999 (2) 268 in the case of Jagdish Rai & Brothers v. Union of India, the Apex Court observed that the courts have taken the view that award of interest under section 34 of the CPC is a matter of procedure and ought to be granted in all cases when there is a decree for money unless there are strong reasons to decline the same. However, it has been observed in it that the claim for interest not having been made before the Court in

which the proceedings for making award the rule of the court were pending would certainly disentitle the appellant from making such a claim during first three stages of pre-arbitration and post-arbitration that is between award and filing of application inasmuch as several considerations will have to be examined before award of interest and its rate. Therefore, when the award had not been challenged for not granting interest, the award could not be upset to that extent. Therefore the said part of the award was not disturbed in the order of the Apex Court. In the case before us, the relief with respect to interest pendente lite has been specifically dropped and it was not referred to the arbitrator. That fact will weigh heavily in favour of the respondent herein.

12.2. In *Municipal Committee Tauru v. Harpal Singh*, (1998) 5 SCC 635, it has been observed by the Apex Court that the relief must be granted on the basis of claim put forth by a party. That, inconsistency in claim could not be ignored by the court on the ground that substantial justice must be done to the parties on both the sides. It is very clear that the claim of interest pendente lite was not a claim before the arbitrator nor it was a claim before the Court at the relevant point of time when the award was made the rule of the court. In that view of the matter when this was not a subject matter before the court or before the arbitrator, there was no scope for arbitration on this subject.

13. When there was no reference to the arbitrator, the arbitrator was not required to decide the issue of interest pendente lite and, therefore, the decision on that subject cannot be said to be unlawful or without jurisdiction. In that view of the matter, there was no reason for the court below to remit the issue regarding interest pendente lite for decision of the arbitrator. Moreover, the said issue was not before the arbitrator or before the court concerned at the relevant point of time when the award was made the rule of the court. Therefore, the court was not required to award interest pendente lite. So on both the grounds, the petitioner was not entitled to the claims as to interest pendente lite as aforesaid and, therefore, the trial court cannot be said to have committed illegality in dismissing the said matter. It would be relevant to note that the parties made a joint request to the Court for appropriate relief at exh.36 at page 63. There also the relief was that the interest be awarded from the date of cause of action till the date of entering the reference by the Arbitrator and also from the date of making of the award

till satisfaction of the award. This would mean that the interest during the pendency of the arbitration proceeding was specifically dropped from the said relief clause. At one stage, the argument was advanced that this was simply a copy and it is not clear whether the said application was signed on behalf of the present petitioner but subsequently this plea was dropped and it was not disputed before me that this was a joint pursis filed by the parties at exh.36 at page 63 before the court concerned. Therefore, when the aforesaid plea with respect to interest pendente lite was dropped on a joint pursis, it was not open to the petitioner to re-agitate the said plea before the Court.

13.1. in AIR 1990 SC 53, K V George v. The Secretary to Government, Water and Power Dept., Trivandrum, it was a matter relating to termination of contract. The claimant did not raise all the issues arising out of the termination of the contract in the first claim petition. It was held by the Apex Court that the second claim petition raising the remaining issue is barred under the provisions of Order 2 Rule 2 of the CPC. It has also been observed that the principles of res judicata and constructive resjudicata are applicable to the arbitration proceedings also. When the claimant raised some of the issues arising out of termination of the contract in the first claim petition, then he was precluded from seeking the second claim from the remaining issues. The aforesaid principle laid down in the aforesaid decision will squarely apply to the facts of the case before this Court also. On applicability of Section 34 of the CPC, it has been laid down in (1999) 6 SCC 51 in the case of Hotel Seaking & Ors. v. Kerala Financial Corporation that the said provision of Section 34 will not be applicable where interest rate has been specified in the agreement between parties. On facts, it can be said that the parties have specifically preferred the issue of interest before and after the arbitration proceedings. Therefore, it can be positively shown that the interest pendente lite has been specifically dropped from the terms of reference.

14. In JT 1999 (2) SC 268 (supra), it has been clearly laid down that when no claim was made before the court of the rule of the court, then in absence of claim before the court, no interest can be awarded till date of a decree. Learned Advocate for the respondent has positively argued that there was no prayer for claim for the enlargement of reference and, therefore, the claim of interest could not be decided by the court below and it could not be referred back to the arbitrator for decision

as was sought for by the petitioner before the trial court.

15. Considering the grounds argued on behalf of the petitioner, it is very clear that the trial court cannot be said to have committed jurisdictional error in denying the prayer for remitting the issue of interest pendente lite for decision to the arbitrator and also when the trial court refused to award interest pendente lite. So far as the first part is concerned, there was no reference to the arbitrator. Moreover, this was not prayed till the award was made the rule of the Court. Moreover, the said interest was specifically dropped from reference which may be on the strength of the case law of the Hon'ble Apex Court at the relevant point of time. The said award has not been challenged and even order of the court making the award the rule of the court has never been challenged. So far as the award of interest pendente lite by the court is concerned, the court below could not do it when there was no award passed by the arbitrator and, therefore, it was not open to the court below to pass award to direct the respondents to pay interest pendente lite. Any way, there is no jurisdictional error committed by the trial court and it cannot be said that the order of the trial court is illegal and wrong. It would not be open to this court to interfere with the said order of the trial court unless it is shown that there is jurisdictional error relating to any failure of justice or miscarriage of justice. This has not been shown and, therefore, this Revision Application cannot be entertained.

16. When an Arbitrator declares his award and when it is made rule of the Court, the matter is finally put to an end and it rests there finally. The law and the case law will have ordinarily prospective operation unless it is made clear therein that it will have retrospective effect. Such intention may be express or implied. However, if a law or a case law does not demonstrate such an intention, it has to be inferred that it has prospective effect only.

16.1. At the best, the law or a case law may apply to a pending proceeding. For instance, such a law can apply even at the stage of appeal if pending on the date of application of the law. But if the appeal is not pending, such a new law would not apply to such matters not pending anywhere at any stage.

16.2. Laws and case laws are not meant to unsettle the settled position. There cannot be any case of "about

turn" on application of a new law or case law. In fact, even review of a decided case would not be permissible on the ground that new law or a case law has come into being after final disposal of any given case.

16.3. In the case before us, the Arbitrator declared the award and the award was in accordance with the terms of the reference. Upto this stage, question of interest for the period relating to pending arbitration was not an issue. Then the matter went to the court and the award of the Arbitrator was made a rule of the Court. Even upto that stage the aforesaid question was again not a subject matter of dispute or issue. The decision of Hon'ble the Supreme Court was pronounced only thereafter and the new dispute was brought to the door of the court thereafter. Therefore, the trial court could not have come to the rescue of the petitioner by disturbing and unsettling the settled legal position. If such an exercise is permitted, there would be endless uncertainty in the legal field and finality would never be there.

16.4. It, therefore, cannot be said that the trial court has committed jurisdictional error by not unsettling the settled position on account of a subsequent pronouncement of a judgment by the Hon'ble Supreme Court. The judgment and order of the trial court can, therefore, not be said or treated to be illegal and without jurisdiction on this count when the court refused to refer the issue to the arbitrator and also refused to decide the said issue itself. The trial court had to remain within four corners of the terms of reference and if it remained within the four corners, it could not be treated to have committed illegality. No law has been shown authorising a court either to refer to the Arbitrator or to decide by itself, such an issue which was not a subject matter in dispute before the Arbitrator or before the Court till the date of award of the Arbitrator or till the date on which the award was made a rule of the Court.

17. In the aforesaid view of the matter, there is no merit in the present Revision Application and, therefore, it deserves to be dismissed with costs of the other side. This Revision Application is accordingly ordered to be dismissed with costs of the respondent. Rule discharged.

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msh.

